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IN THE

SUPREME COURT OF THE UNITED STATES.

No.

WINIFRED McCOY,

Petitioner,

VS.

PAUL SILER and T. A. SILER, Individually and Trading as SILER BROS., and EDDIE CURTIS DUNN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Winifred McCoy, by her attorneys, Richter, Lord & Farage, Esquires, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 10, 1953.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is unreported. The opinion of the United States Court of Appeals for the Third Circuit is unreported.

JURISDICTION.

The order of the Court of Appeals for the Third Circuit was entered on June 10, 1953. The jurisdiction of this Court is invoked under Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. A., Section 1254.

QUESTION PRESENTED.

Where a non-resident motorist operates his vehicle in a state whose statutes provide that, by the operation of such vehicle within the State, he designates the State's Secretary of Commonwealth his agent to accept service of process in any civil action arising out of such operation, when such non-resident is sued in any local or federal court within the State, does he not, by his conduct in driving within the state waive his right to object to venue, when sued in the U. S. Court for the District in which he operated his vehicle and where he injured the plaintiff, also a non-resident?

STATUTES INVOLVED.

Act of June 25, 1948, C. 646, 62 Stat. 935, 28 U. S. C. A. 1391(a):

"Sec. 1391 Venue generally

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

Federal Rules Civil Procedure Rules 4(d) (7), 4(f), 28 U. S. C. A.:

"Rule 4 Process

* * * * * * * *

"(d) * * * * * * *

"(7) * * * it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

* * * * * * * *

"(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

Pennsylvania Act of May 14, 1929, P. L. 1721, No. 563, Section 1, as amended by the Act of May 23, 1949, P. L. 1651, Section 1, Vol. 75, Purdon's Statutes, Section 1201:

"* * * any non-resident of this Commonwealth, being the operator or owner of any motor vehicle who shall accept the privilege extended by the laws of this Commonwealth to non-resident operators and owners of operating a motor vehicle * * * within the Commonwealth of Pennsylvania * * * shall, by such acceptance * * * and by the operation of such motor vehicle within the Commonwealth of Pennsylvania, make and constitute the Secretary of Revenue of the Commonwealth of Pennsylvania, his, her or their agent for the service of process in any civil suit or a proceeding instituted in the courts of the Commonwealth of Pennsylvania or in *the United States District Courts of Pennsylvania* against such operator or owner of such motor vehicle, arising out of, or by reason of, *any* accident or collision occurring within the Commonwealth in which such motor vehicle is involved." (Emphasis ours.)

Pennsylvania Rules of Civil Procedure, Rule 2079, 12 Purdon's Statutes Annotated:

"Rule 2079 Service of process

"(a) if an action of the class specified in Rule 2077(a)(1) is commenced in the county in which the cause of action arose, process may be served upon the defendant personally or by having the sheriff of said county send by registered mail, return receipt requested, a true and attested copy of the process:

(1) to the Secretary of the Commonwealth, accompanied by the fee prescribed by law,

(2) to the defendant at his last known address with an endorsement thereon showing that service was made upon the Secretary of the Commonwealth."

STATEMENT OF THE CASE.

This is a petition for certiorari relating to a decision of the Court of Appeals for the Third Circuit, which affirmed a ruling of the District Court for the Eastern District of Pennsylvania, sustaining the motion of the defendant to dismiss this action for lack of venue. This action for damages arises out of a collision of two motor vehicles upon a state highway in Montgomery County, Pennsylvania, within the Eastern District of Pennsylvania. The plaintiff, operator of one of the vehicles, is a citizen and resident of Des Moines, Iowa. The defendants are citizens and residents of Silver City, North Carolina. The action of the plaintiff was instituted in the United States District Court for the Eastern District of Pennsylvania on the basis of diversity of citizenship. Service of process was made upon the defendants in accordance with Pennsylvania Rule of Civil Procedure, Rule 2079, 12 Purdon's Statutes Annotated and under the Act of May 14, 1929, P. L. 1721, No. 563, Section 1, as amended by the Act of May 23, 1949, P. L. 1651, Section 1, 75 Purdon's Statutes Annotated, Section 1201, which is popularly known as the Non-resident Motorists Act. (See Statutes Involved, supra.)

Rule 2079 of the Pennsylvania Rules of Civil Procedure suspends the procedural provision of this Act of May 14, 1929, as amended, to the extent, inter alia, that it provides for service upon the Secretary of the Commonwealth by registered mail, and also upon the defendant by registered mail at his last known address, with an endorsement thereon showing that service was made upon the Secretary of the Commonwealth.

Service of process was made upon the defendants to this action in the manner prescribed by the statute and the rule of procedure herein set forth.

Defendant moved in the District Court for dismissal of this action on the grounds of improper venue and lack of jurisdiction. The Court, Kirkpatrick, Ch. J. (although having previously ruled in *Zurkow, et al. vs. La Brie*, C. A. No. 10658, D. C., E. D., Pa., 1950, unreported, under similar circumstances that venue was properly laid in this District), entered an order that the action be dismissed, on the authority of *Martin vs. Fischbach Trucking Co.*, 183 F. 2d 53 (C. A. 1, 1950). Following this, an appeal was taken to the United States Court of Appeals for the Third Circuit. In an opinion by Judge Goodrich dated June 10, 1953, a three-judge Court of Appeals, by a divided court, Judge Maris concurring and Chief Judge Biggs dissenting, affirmed the Court below. This petition followed.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred in the following respects:

1. In holding that the non-resident defendants who caused the motor vehicle involved in this case to be driven into the State of Pennsylvania, thereby constituting the Secretary of the Commonwealth of the said state, their agent for service of process pursuant to the law of Pennsylvania, had not thereby waived their right to object to venue in the District where defendants operated their vehicle and injured plaintiff.

2. In ruling, as regards waiver of the Federal venue privilege created under 28 U. S. C. A., Section 1391(a), that a distinction must be made between cases in which the non-resident *motorist expressly designates* an agent to receive process and cases in which the *State, by statute, designates*

a state official as an agent to receive service of process for the non-resident motorist who drives within the State.

3. In ruling, as regards waiver of the Federal venue privilege that there is a distinction between the conduct of a non-resident motorist who operates his vehicle in Pennsylvania under said Non-resident Motorists Act, on the one hand, and, on the other, the conduct of a corporation which expressly designates a state official as its agent for service of process, pursuant to a Foreign Corporations Act, which latter conduct has been held by this Court to constitute a waiver of venue objections in the case of *Neirbo vs. Bethlehem Shipbuilding Corp., Ltd.*, 308 U. S. 165, 60 S. Ct. 153 84 L. Ed. 167 (1939).

REASONS URGED FOR GRANTING THE WRIT.

By admission both of the majority and the minority opinions in the Court of Appeals for the Third Circuit, the ruling below is flatly contrary to the holding of the Court of Appeals of the Sixth Circuit in *Olberding vs. Illinois Central Railroad Company*, 201 F. 2d 582 (C. A. 6, 1953). This Court granted certiorari in *Olberding* on May 4, 1953, 73 S. Ct. 867.[1] It is also admittedly contrary to a large number of

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[1] In addition, the Court of Appeals for the Fourth Circuit in **Knott Corporation vs. Furman**, 163 F. 2d 199 (C. C. A. 4, 1947) cert. den. 332 U. S. 809, 68 S. Ct. 111 (1947), while dealing with the conduct under a Foreign Corporations Act, as distinguished from a Non-resident Motorists Act, expressly relied upon District Court cases dealing with Non-resident Motorists Acts, as authority for its own conclusions. Thus the decision below is also implicitly contrary to the ruling of the Fourth Circuit. On the other hand, supporting the view of the Court below, on the effect of Non-resident Motorists Acts, see: **Martin vs. Fischbach Trucking Co.**, 183 F. 2d 53 (C. A. 1, 1950) in which, however, the opinion was written by Judge Maris visiting from the Third Circuit, who concurred in the majority opinion below.

District Court cases from many circuits.[2] The number of cases which have raised this specific problem reflect the importance to the entire country of the issues here presented.[3]

Even on a short ride on any important highway, in any State, a motorist is inevitably impressed by the amazing number of out-of-state vehicles which he passes. The increased number of non-resident motorists and their lack of familiarity with local traffic conditions and road hazards have served to multiply the number of accidents in which non-residents are involved and to accentuate the resulting

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[2] See the following cases cited by the majority opinion in its Footnote No. 6: **Falter vs. Southwest Wheel Co.**, 109 F. Supp. 556 (W. D. Pa., 1953), expressly disapproving **Martin vs. Fischbach**, supra; **Archambeau vs. Emerson**, 108 F. Supp. 28 (W. D. Mich., 1952), expressly disapproving **Martin vs. Fischbach**, supra; **Jacobson vs. Schuman**, 105 F. Supp. 483 (D. Vt., 1952), expressly disapproving **Martin vs. Fischbach**, supra; **Garcia vs. Frausto, et al.**, 97 F. Supp. 583 (E. D. Mo., 1951); **Kostamo vs. Brorby, et al.**, 95 F. Supp. 806 (D. Neb., 1951), expressly disapproving **Martin vs. Fischbach**, supra; **Burnett vs. Swenson**, 95 F. Supp. 524 (W. D. Okla., 1951), expressly disapproving **Martin vs. Fischbach**, supra; **Thurman, et al., vs. Consolidated School Dist.**, 94 F. Supp. 616 (D. Kan., 1950), expressly disapproving **Martin vs. Fischbach**, supra; **Urso vs. Scales**, 90 F. Supp. 653 (E. D. Pa., 1950); **Morris vs. Sun Oil Co.**, 88 F. Supp. 529 (D. Md., 1950; **Steele vs. Dennis**, 62 F. Supp. 73 (D. Md., 1945); **Krueger vs. Hider**, 48 F. Supp. 708 (E. D. S. C., 1943); **Andrews vs. Joseph Cohen & Sons**, 45 F. Supp. 732 (S. D. Tex., 1941).

The only unappealed District Court case squarely supporting the view of the Court below is **Waters vs. Plyborn**, 93 F. Supp, 651 (D. C. E. D., Tenn., 1950).

[3] This problem has been the subject of many law review articles, among which are the following, which support the views of the petioner herein and are critical of the view of **Martin vs. Fischbach**, supra; George Washington Law Review 19:559-61, April, 1951; Georgetown Law Journal 39:143-45, November, 1950, by John Letterman; Indiana Law Journal 26:285-91, Winter, 1951; Iowa Law Review 36:705-8, Summer, 1951; Minn. Law Review 35:404-7, March, 1951; Southern California Law Review 24:498-500, July, 1951, by George W. Vinnedge. Accepting **Martin vs. Fischbach**, supra, with reservations, see: Michigan Law Review 49:1072-4, and Stanford Law Review 3:347-52, February, 1951. Supporting the views of that case see: Virginia Law Review 36:1102-04, December, 1950.

difficulties involved in attempting civil redress of grievances, especially where both parties are non-residents.

In this case, the plaintiff was a resident of Iowa, while the defendants were residents of North Carolina. The accident occurred in Pennsylvania. The witnesses necessary for proof of the plaintiff's claim, as well as for proof of any affirmative defenses, particularly the physicians and hospitals which rendered initial medical aid, are inevitably restricted to the locale of the accident. It seems absurd that judicial machinery in 1953 should be so stilted as to make it impossible to try the suit in a Federal Court, in the only Federal District in which the case can be practically tried. Yet the decision below closes the doors of the Federal Courts sitting in Pennsylvania, to the injured non-resident plaintiff.

Clearly, if this suit were brought in a Federal Court at the domicile of either the plaintiff or defendant, as concededly might be done under Section 1391(a) of the Judicial Code,[4] the defendant could with propriety move to transfer to the Federal Court for the District in which the accident occurred under Section 1404(a).[5] So, too, if the plaintiff had brought the suit in a State Court in the county where the accident occurred, the defendant obviously could remove the suit to the District below. If so, is it not extraordinary that the suit may not be initiated in the latter forum?

The majority opinion below of Judge Goodrich shrugs aside concern over the disposition of this issue by suggesting that the result either way is inconsequential and without hardship on the plaintiff if he cannot sue in the District below. The conclusive answer seems to be that if Congress has seen fit to confer a right to a Federal forum in diversity cases, it is not for any Court to gainsay that right by minimizing its importance.

In point of fact, however, the suggestion below, that it is immaterial to the plaintiff whether he sues in a State Court

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[4] Act of June 25, 1948, C. 646, 62 Stat. 28 U. S. C. A., sec. 1391 (a).

[5] Act of June 25, 1948, C. 646, 62 Stat. 937, 28 U. S. C. A., sec. 1404 (a).

or Federal Court, is inaccurate. As recently as June 1, 1953, in *Levinson & Hall vs. Deupree,* U. S. , 73 S. Ct. 914 (1953), this Court stated at page 916:

> "We have recognized that 'the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic.' *Guaranty Trust Co. vs. York,* supra, 326 U. S. at 108."

In *Levinson & Hall vs. Deupree,* supra, the Court held that Federal practice controls the question of whether a plaintiff should be permitted to amend his libel, after the running of the Statute of Limitations; and such an amendment was permitted, contrary to the practice in Kentucky where the Federal Court was sitting. Obviously, the difference between State and Federal "forms and mode" may on occasion make the difference between recovery and no recovery. In the instant case, too, there are important procedural differences in State and Federal machinery. Thus, plaintiff is particularly anxious to avail himself of his right to sue in the Federal Court on diversity grounds in order to utilize the more liberal discovery procedure available under Federal practice, instead of being limited to the much narrower discovery provided by State law.[6] The importance to a nonresident plaintiff of full discovery is obviously extremely significant where his injuries bar his getting names of witnesses immediately after the accident and the fact that he is a stranger is an obstacle to later attempts at investigation.

It is noteworthy that in *Neirbo vs. Bethlehem Shipbuilding Corp., Ltd.,* 103 F. 2d 765, 770, the Court of Appeals for the Second Circuit made the same argument as was made by Judge Goodrich below:

> "There seems little hardship involved to the plaintiffs, for appellee can be sued in the appropriate federal

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[6] Anderson Pennsylvania Civil Practice, Vol. 5, Page 526.

districts, while the entire action as now conceived by the plaintiffs can be brought in the state courts."

Notwithstanding, this Court granted certiorari, thereby recognizing the importance of the difference between suing in a State or in a Federal Court.

As already suggested, the identical problem involved in this case was involved in *Olberding vs. Illinois Central Railroad Company,* 201 F. 2d 582 (C. A. 6, 1953), and this Court granted certiorari in that case on May 4, 1953 (73 S. Ct. 867). It is respectfully urged that this Honorable Court grant the instant petition, so that argument on this case and *Olberding* can be heard at the same time and a decision handed down resolving this important question of Federal law on which there is irreconcilable conflict in the circuits.

ARGUMENT.

Most of what can be said by way of legal argument on either side of this issue or in rebuttal has been said and said well by the Courts which have dealt with the problem, and particularly the Courts of Appeal. It would be supererogation to burden this Court by a rephrasing of the language of these jurists. Most of the significant arguments on this question are set forth in the majority, concurring and dissenting opinions below; in *Knott Corp. vs. Furman,* 163 F. 2d 199 (C. A. 4, 1947), cert. den. 68 S. Ct. 111 (1947); in *Martin vs. Fischbach Trucking Co.,* 183 F. 2d 53 (C. A. 1, 1950); and in *Olberding vs. Illinois Central Railroad Co.,* 201 F. 2d 582 (C. A. 6, 1953), certiorari granted May 4, 1953 (73 S. Ct. 867).

It is respectfully requested that the Court consider all of

the arguments in these cases in favor of petitioner as incorporated herein at this point.

Petitioner desires, however, to emphasize a few points which perhaps have not been fully, if at all, considered before.

It is noteworthy that the majority opinion below and virtually all the decisions which have rejected petitioner's viewpoint have done so in reliance upon the holding of *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 S. Ct. 273 (1895). These cases have also emphasized the language of Mr. Justice Frankfurter in footnote 15 of *Neirbo vs. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 173, 60 S. Ct. 153, 157 (1939), L. Ed. 167, that,

> "The decisive difference * * * [between Neirbo and Keasbey], is that in the latter case the designation under state law which is the basis of consent had in fact not been made."

The language of this footnote has been construed by these Courts as interpreting *Keasbey* to require a distinction to be made between an express designation by the defendant of an agent to receive process, on the one hand, and a statutory designation by the State of a State Official upon whom service of process may be made if the defendant does business or operates a vehicle within the State without previously expressly appointing an agent to receive such process, on the other hand.

In other words the majority below reads *Keasbey* and Footnote No. 15 of *Neirbo* to hold that a non-resident defendant or foreign corporation will be deemed to waive venue objections only if such defendant expressly appoints as agent to receive process. But if such defendant, though failing to comply with a mandate to appoint such an agent avails itself of the privilege of doing business or operating a motor vehicle within the State, the Court below understands these earlier rulings to mean that such conduct is not sufficient to constitute consent to a waiver of the venue

privilege *even though a State Statute provides that by such conduct the defendant shall be deemed to have appointed a State Official as its agent to receive process.*

It is respectfully suggested that even a casual reading of *Keasbey* will reveal that the Court in *Keasbey* could not possibly have intended to so hold and that the dictum of Mr. Justice Frankfurter in Footnote No. 15 has been grossly misunderstood.

In *Keasbey*, a corporation created in Pennsylvania sued a corporation created in Massachusetts in a Federal District Court in New York. The action was for damages resulting from a trademark infringement in violation of *Federal* Law. There is no indication in the opinion as to where the cause of action arose.[7] Nor did the plaintiff rely upon *any State Law* either as creating the cause of action or as designating any person as an agent to receive process for the defendant, if the defendant did business within the State. The plain fact of the matter is that at the time of the *Keasbey* decision, the New York law pertaining to foreign corporations did not even attempt to designate any agent to receive process on behalf of the defendant.[8]

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[7] It is likewise important to note that in **Keasbey** the cause of action derived from Federal law, whereas in the instant case, the cause of action sprang from Pennsylvania law, originated within the bounds of that State, and the action was brought in a Federal Court sitting in that State.

[8] The New York Act of 1892, then in force, New York General Corporation Law, Act of 1892, C. 687, sec. 16, did require foreign corporations to register and to appoint an agent to receive process, **but there was no provision in the New York Law that if the foreign corporation doing business within the State failed to appoint an agent, then by its conduct, the corporation would be deemed to have appointed a State official as such agent.** In this connection, it is interesting to note that service in **Keasbey** was not made by serving a State official but by delivering a copy of the subpoena to a "managing agent" of the defendant.

As a matter of fact, there is still no such provision as the one discussed in the emphasized language in the preceding paragraph of this footnote in the current New York Law. New York General Corporation Law, Act of April 25, 1935, C. 471, sec. 1, 22 McKinney's Consolidated Laws, sec. 210.

In other words, it was not contended by the plaintiff in *Keasbey,* nor could it have been, that a *State law* designated anyone to receive process for the defendant. Indeed, there is not one word in *Keasbey* to show that an agent to receive process was designated *either* by the defendant, expressly or by any State statute on the basis of any conduct of the defendant. *The opinion in Keasbey does not so much as mention any State statute.* Accordingly, the Court in *Keasbey* could not possibly have attempted a distinction between the effect of an express designation of an agent by the defendant, on the one hand, and the designation of an agent by statute, on the basis of defendant's conduct, on the other. It is true that, in passing, the Court in *Keasbey* stated at page 229:

> "A corporation, by doing business or appointing a general agent in a district other than that in which it is created, does not waive its right, if seasonably availed of, to insist that the suit should have been brought in the latter district."

But, that expression goes no further than to say *absent a State statute* providing otherwise, the mere doing of business does not constitute a waiver of the venue privilege.

When Mr. Justice Frankfurter says in Footnote No. 15 of *Neirbo* that in *Keasbey,*

> "The designation under state law which is the basis of consent had in fact not been made."

he was entirely accurate. *There had been no designation of an agent to receive process, so far as Keasbey shows, either by the defendant or by the State statute.* But, certainly, Mr. Justice Frankfurter could not, in view of the facts in *Keasbey,* have cited that case as requiring a distinction between a conscious designation of an agent to receive process *by the defendant* on the one hand, and the designation of an agent *by statute,* on the other. The ma-

jority opinion below misreads Mr. Justice Frankfurter's sentence as if to say that in *Keasbey*,

> "The designation *by the defendant* under state law which is the basis of consent had in fact not been made."

It is respectfully submitted that the reference in *Neirbo* to *Keasbey* was intended merely to stress the absence of *any* designation, *either by the defendant or by State statute*, rather than to distinguish designation by the one from designation by the other.[9]

Parenthetically, it may be observed that all of the analogous cases involving foreign corporations upon which the majority below relies, also involved foreign corporation statutes which did *not* contain a provision that doing business in the State without designating a process agent should be equivalent to a designation of such an agent.[10] Further-

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[9] It is significant that Mr. Justice Frankfurter not only omitted the words "by the defendant" after the word "designation", but that he followed the word "designation" with "under state law", so that what he says may be reasonably construed to emphasize that there was no state **statute** which designated an agent to receive process.

[10] **Robinson vs. Coos Bay Pulp Corp.**, 147 F. 2d 512 (C. C. A. 3, 1945), which involved the Pennsylvania Act of May 5, 1933, P. L. 364, Art. X, sec. 1011; **Moss vs. Atlantic Coast Line R. Co.**, 149 F. 2d 701 (C. A. 2, 1945), which involved the New York General Corporation Law, Act of April 25, 1935, C. 471, sec. 1, 22 McKinney's Consolidated Laws, sec. 210; **Cummer-Graham Co. vs. Straight Side Basket Corp.**, 136 F. 2d 828 (C. A. 9, 1943), which involved Idaho Code, 1947, Title 30, Chapter 501, sec. 8;

It is interesting to note that in **Moss vs. Atlantic Coast Line R. Co.**, supra, relied upon by the majority below, the cause of action involved arose **outside** the state in which service was made and suit brought. The Court used the following language at page 702:

> "* * * It is, so far as we can find, still an open question whether, if the state law requires consent to service in actions upon claims arising **outside** its borders, from a foreign corporation doing business within it, and the corporation does business without filing the consent, it subjects itself to personal service upon claims arising **outside**, as it would have subjected itself, had it

more, in each of these cases, the *express* appointment of a process agent required by statute had *not* been made.

The decision of the majority below apparently is premised on the notion that a waiver of venue privileges must be conscious and voluntary. It would seem, however, that this notion was exploded by *Neirbo*. For even where, as there, a foreign corporation expressly designates an agent *to receive process*, it is difficult to perceive how such designation involves a conscious consideration of *venue*. Indeed, it is unlikely that any business man who appoints an agent *to receive process*, no matter how consciously or voluntarily, would necessarily be aware of venue problems or see any relationship between acceptance of process on the one hand and venue on the other.

Nor may a foreign corporation's designation of an agent to receive process, in any case, be regarded as strictly voluntary where it is made merely in obedience to a statute and not presumably out of any self-interest. Most foreign corporations would never voluntarily designate such an agent. They do so only under necessity and compulsion. Waiver of venue by defendant's appointment of an agent to receive process is thus neither conscious nor voluntary.

Therefore, it is respectfully submitted, even from the strictly "logical" viewpoint which the majority below professes to follow, there appears to be very little logic in regarding the doing of business or the driving of a vehicle in the State as any less voluntary and conscious a waiver of venue objections than the defendant's express appointment of an agent to receive process. There is at best but a "minuscule" or a "gnat's heel" of difference, from any practical standpoint between the two situations.

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complied with the local statute; **or whether in that case the corporation may be served only in actions upon claims arising within the state.** * * *" (Emphasis ours.)

Thus the Court seems to suggest that had the cause of action arisen within the State of New York, it would have found the defendant to have waived venue even though it had not designated an agent and even though the statute involved was the New York one discussed above.

It is respectfully submitted that with respect to a natural person driving a vehicle into a State, as in the case of a foreign corporation coming into the State to do business, the question "whether cases are to be tried in one locality or another is now to be tested by basic principles of fairness".[11] The extent of inter-State automobile traffic makes "intolerable", with respect to non-resident motorists no less than does the doing of business by foreign corporations, "their immunity from suit in the states of their activities",[12] whose laws create the cause of action and where the crucial witnesses normally reside.

Whether jurisdiction rests on "power" or whether it rests on "considerations of fairness", it is difficult to understand why a non-resident's operation of a motor vehicle should suffice to create jurisdiction but not be enough to make reasonable a waiver of mere venue privileges. If a State under due process may exercise jurisdiction over a non-resident bailor of a vehicle, who has never set foot in

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[11] **Polizzi vs. Cowles Magazines, Inc.,** U. S. , 73 S. Ct. 900, 904 (1953). See on this point **International Shoe Co. vs. State of Washington,** 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); **Travelers Health Ass'n vs. Commonwealth of Virginia,** 339 U. S. 643, 70 S. Ct. 927 (1950); **United States vs. Scophony Corp. of America,** 333 U. S. 795, 68 S. Ct. 855, 92 L. Ed. 1091 (1948).

Judge Goodrich in his opinion below states that "it is now perfectly clear that jurisdiction rests on power". Apparently by power he means "physical power" based on presence within the state. See Goodrich, Conflict of Laws (2d ed.) 156 (1938), where he quotes to that effect from Mr. Justice Holmes in **McDonald vs. Mabee,** 243 U. S. 90 (1917). Whatever emphasis may have previously been put by the Courts on presence or the physical control theory, it seems clear today that the test of power has been replaced by that of fairness to the parties. Cf. **Young vs. Masci,** 289 U. S. 253, 53 S. Ct. 599 (1933) where a non-resident bailor was held liable for personal injuries inflicted upon third parties by a bailee not his agent, although there was no evidence that the defendant bailor had ever been physically present in the state where the injuries were inflicted and where the suit was brought. There would seem to be no reason for confining "considerations of fairness" to corporation cases and for deciding cases involving natural persons on some other basis.

[12] See **Neirbo** at 308 U. S. 170, 60 S. Ct. 155.

the State, merely because he lent his vehicle to a bailee not his agent,[18] why may not the State with equal propriety under due process, in the exercise of a salutary public policy, provide that the doing of certain acts therein shall be regarded as a waiver of certain prior rights as to venue?

There remains only to consider one or two arguments advanced by Judge Maris concurring below which appear not to have been raised elsewhere.

Judge Maris contends that the District Court below never obtained *jurisdiction* over the defendant because *notice*, to the defendant, was sent to him outside of the State by registered mail. He hereby concludes that *process* was served in North Carolina where the defendants received such notice, and that it was of no effect for the reason that Federal Rule of Civil Procedure 4(f) requires service to be made within the territorial limits of the State in which the District Court is held.

It is respectfully submitted that Judge Maris errs in failing to distinguish service of process from notice. *Process* was served on the Secretary of the Commonwealth, *in Pennsylvania*, thus complying with the requirements of Rule 4(f). Heretofore, it has never been ruled by this Court or any other that, under the requirements of due process, *notice* must also be given within the territorial limits of the State. The contention that notice must be given within the State proves too much. Every State Court which renders judgment against a non-resident motorist normally serves process on the defendant by serving a State official within that State, and then notifies the non-resident by mail wherever he may be. Clearly, a State may not serve process outside its own borders. If giving of notice is part of process State Courts as well as Federal would lack jurisdiction over defendants unless notified within the State. Yet historically, States have rendered judgments against non-resident motorists who had left the State at time of

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[18] See Young vs. Masci, supra, Footnote No. 11.

suit and could not have been notified within the State. *Hess vs. Pawloski*, 274 U. S. 352, 47 S. Ct. 632 (1927); *Young vs. Masci*, 289 U. S. 253, 53 S. Ct. 599 (1933). Clearly under the view of Judge Maris, the whole structure of *Hess vs. Pawloski*, supra, is overturned.

In his first footnote, Judge Maris makes another inadvertent mistake. He suggests that the service was improper in this case because it was upon the Secretary of the Commonwealth instead of the Secretary of Revenue as required by the Pennsylvania Non-resident Motorists Act. However Pennsylvania Rule of Civil Procedure 2100[14] expressly provides that the procedural provisions of the Non-resident Motorists Act are repealed and replaced by Pennsylvania Rule of Civil Procedure 2079.[15] Judge Maris, himself, refers in his second footnote to Pennsylvania Rule of Civil Procedure 2079 which supersedes the non-resident motorist statute by substituting the Secretary of the Commonwealth for the Secretary of Revenue. Accordingly, service was made by the plaintiff in this case in strict compliance with the governing statutes and procedural rules.[16]

CONCLUSION.

It is respectfully submitted that there is nothing in any of the decisions of this Court indicating that it was ever intended to make a distinction between waiver of venue arising from express designation of a process agent and

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[14] Pennsylvania Rules of Civil Procedure, Rule 2100, 12 Purdon's Statutes.

[15] Pennsylvania Rules of Civil Procedure, Rule 2079, 12 Purdon's Statutes.

[16] It is clearly established that the Pennsylvania Rules of Civil Procedure have the effect of statute. **Neff vs. Hindman**, 77 F. Supp. 4, (D. C., W. D., Pa., 1948); **In re Schofield**, 362 Pa. 201, 66 A. 2d 678 (1949); Pennsylvania Act of June 21, 1937, P. L. 1982 No. 392, sec. 1, as amended, 17 Purdon's Statutes, sec. 61.

that arising from the statutory designation of a process agent following upon the doing of a particular act. The waiver of venue which has been found by this Court to arise from the former situation is no more voluntary and conscious a waiver of venue per se than that which has been found by a number of the United States Courts of Appeals to arise from the latter situation. If under the requirements of due process, jurisdiction over a non-resident motorist in State and Federal Courts can be validly based upon his doing an act that falls within the terms of a State Non-resident Motorists Act, there can be no meritorious reason why waiver of venue objections in both State and Federal Courts cannot also be held to arise from the same conduct.

A writ of certiorari should be here granted and the holding of the majority of the Court below should be reversed.

Respectfully submitted,

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